No. 79-1429, No. 79-1583

MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL., *Petitioners,*

v.

F. RAY MARSHALL, SECRETARY OF LABOR, ET AL., *Respondents.*

NATIONAL COTTON COUNCIL OF AMERICA, *Petitioner,*

v.

F. RAY MARSHALL, SECRETARY OF LABOR, ET AL., *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF ASARCO INCORPORATED AS AMICUS CURIAE

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BRIEF OF ASARCO INCORPORATED AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

ASARCO is a leading smelter and refiner of non-ferrous metals. As such, it is directly affected by many occupational safety and health regulations promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-78 ("the Act"), and has a direct interest both in the substantive provisions of such regulations and in the standards and procedures governing their adoption. ASARCO is a party to two judicial proceedings involving a review of OSHA health standards: No. 78-1959 and consolidated cases in the United States Court of Appeals for the

Ninth Circuit, for review of OSHA's inorganic arsenic standard; and No. 79-1048 and consolidated cases in the United States Court of Appeals for the District of Columbia Circuit, for review of OSHA's inorganic lead standard (the *Lead Case*).[1]

ASARCO believes that the issues presented in the case at bar are highly important to substantial segments of U.S. industry, in addition to the textile industry, inasmuch as fundamental questions as to the extent of OSHA's authority under the Act have been raised by OSHA's promulgation of unprecedented and far-reaching health standards.

OSHA has gone very far in its recent substantive health standards. The present case raises serious legal issues as to one such standard. But this case is not alone, and it should not be viewed by this Court in isolation. Rather, the cotton dust standard is part of a continuum involving the earlier benzene standard which this Court struck down last Term, *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, _____ U.S. _____, 100 S. Ct. 2844 (1980) (the "*Benzene*" case), and the later lead standard. The recent Court of Appeals' decisions in this case and the *Lead Case* have improperly vested OSHA with sweepingly broad authority

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[1] The Court of Appeals for the District of Columbia has rendered a decision in the Lead Case, upholding the lead standard for the major lead industries but remanding the record to OSHA for reconsideration of the economic and technological feasibility of the lead standard as it applied to other industries. United Steelworkers of America, AFL-CIO-CLC v. Marshall, No. 79-1048 (D.C. Cir. Aug. 15, 1980). The major lead industries intend to file a petition for writ of certiorari with this Court and, in the interim, have sought a stay of the lead standard.

to do whatever the agency wants.[2] And what OSHA wants, it is now clear, is to require industry to comply with unworkable health standards just so long as the entire industry would not be driven out of business by compliance with any *single* standard, regardless of the cumulative effects of all applicable OSHA standards to the industry (*Cotton Dust*), and to force industry to meet standards as to which no technology exists or looms on the horizon (*Lead Case*). This is agency discretion and power run riot.

The lower court's decisions point toward bedrock questions about the delegation of authority permitted by the Act. This brief is addressed to one of the questions certified by this Court in granting the writs of certiorari: whether the "feasibility" requirement embodied in Section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5), *as interpreted by the Court of Appeals* unconstitutionally delegates legislative power to OSHA.

ASARCO files this brief *amicus curiae* both in its own interest as a subject of far-reaching and unsupportable OSHA standards and to further "the public interest in the administration of justice," *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 581 (1946), given the extraordinary actions of a critical government agency which has seriously affected the stability and well-being of large segments of American industry.

Written consents from all parties to the filing of this brief are on file with the Clerk.

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[2] See Assistant Secretary and OSHA Administrator Eula Bingham's blunt assertion in a 1979 speech, that OSHA is not "prohibited from doing just about anything we want to do." Address by Assistant Secretary Bingham to ABA Institute on Law, Science and Technology in Health Risk Regulation (April 20, 1979), reported at [1979] OSHA Rep. (BNA) 1690 (Apr. 26, 1979).

ARGUMENT

The Decision Of The District Of Columbia Court Of Appeals In The Cotton Dust Case Interprets The Occupational Safety And Health Act So As To Grant OSHA Unreviewable Discretion And Unconstitutional Legislative Authority.

A. Introduction

In the last two decades, Congress has established a number of single-purpose administrative agencies and vested them with broad rule-making and adjudicatory powers. These agencies, in contrast to the broad-mission departments or agencies created in earlier years, have typically been charged with implementing a single policy goal or purpose. Agencies have been created, for example, to regulate or promote the quality of the environment, the availability of equal employment opportunity, the safety of consumer products, the safety of automobiles, and of concern in the present case, safety and health in the workplace — the province of OSHA.

The pursuit by the several agencies of government of their respective single purposes has frequently been characterized by an exclusive regulatory focus upon the statutorily prescribed goal or purpose to be accomplished — such as assurance of healthy and safe workplaces — with limited consideration given by such agencies to competing interests and choices at work in implementing Congress' purpose. Their mission has also been not infrequently undertaken with only a begrudging application of procedural requirements to assure fairness and reasonableness of agency action. This tendency to expand agency power in pursuit of the congressionally articulated goal has not gone unnoticed by the commen-

tators. *J. Ely, Democracy and Distrust, a Theory of Judicial Review* 131-34 (1980); Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 582-87 (1972). Nor has this agency tendency gone unnoticed by this Court. *Cf. Chiarella* v. *United States*, _____ U.S. _____, 100 S. Ct. 1108 (1980); *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

This judicially recognized tendency of regulatory agencies is of particular constitutional significance, as well as of practical importance to the U.S. economy, with respect to agencies' exercise of their rulemaking powers — a legislative function carried out by regulators under a statutory framework created by Congress. Indeed, the confluence of several regulatory agencies' exercise of their respective powers has substantial economic effects upon firms, like ASARCO, carrying on business in the contemporary regulatory environment. U.S. industries typically find themselves regulated by several, and sometimes many, single-purpose agencies, each with a single perspective that is being enforced and implemented as vigorously as possible, without analysis or even consideration of the economic effects of regulatory requirements imposed by sister agencies. Regulation is accomplished in a vacuum, with a single goal in mind.

The vesting of power in the various regulatory agencies has typically been accomplished by Congress' enactment of a broadly worded statute. Thus, at issue in the present case is the provision in OSHA's statutory framework requiring that health standards governing the workplace be "feasible." Section 6(b)(5), 29 U.S.C. § 655(b)(5). The absence of definitional guidance in the

Act permits the regulatory agency, and ultimately the courts, to identify and give specific meaning to the criteria or considerations encompassed in the statutory terms, "feasible" and "feasibility."

The Court of Appeals in *Cotton Dust*, *American Federation of Labor & Congress of Industrial Organizations* v. *Marshall*, 617 F.2d 636 (D.C. Cir. 1979), and subsequently in the *Lead Case*, has ruled upon the agency's determination as to the meaning of "feasibility." The Court in both cases sustained the agency's sweeping definition of "feasibility," namely that OSHA's health standards were valid since, in *Cotton Dust*, the standard would not result in the economic demise of the entire industry, and since, in the *Lead Case*, the standard *might* be technologically achievable in a period of ten years for a *typical* firm *in most of its operations*, even though no technology capable of achieving OSHA's standard presently existed nor did any such technology even "loo[m] on today's horizon." *American Federation of Labor & Congress of Industrial Organizations, AFL-CIO* v. *Brennan*, 530 F.2d 109, 121 (3d Cir. 1975). *Compare Texas Independent Ginners Association* v. *Marshall,* No. 78-2663 (5th Cir. Nov. 14, 1980) (holding that technological feasibility "demands that OSHA requirements must be achievable with existing, nearly developed or available technology"). Slip opinion at 1225 n. 49.

Without question, OSHA's definition of "feasibility" in both cases is extreme. But a more fundamental problem exists than merely a particular agency's unprecedented interpretation, as upheld by the Court of Appeals. What is ultimately at question is whether the Court of Appeals' interpretation of the "feasibility" requirement renders the Act, as construed, an impermissi-

ble delegation of legislative power. For the effect of the decision below is to confer unbridled power upon this single-purpose agency to do whatever it wants to do, so long as an entire industry is not driven out of business by implementation of that single standard by that single agency (*Cotton Dust*), or to require industry to do whatever OSHA wants it to do, even though the technology neither exists nor looms on the horizon, with the effect that ASARCO's plants, and those of other smelters, will have to be rebuilt from the ground up (*Lead Case*).

This sweeping power granted to a single-function agency under the approach of the Court of Appeals constitutes, in our view, a conferral upon the agency of core legislative power reserved to Congress. Specifically, the construction of the statute by the Court of Appeals improperly delegates the essential legislative functions of fashioning and articulating basic industrial policy to a regulatory agency which is neither answerable nor responsible to the public. To that extent, the statute is, as construed by the Court of Appeals, an unconstitutional delegation of legislative power. This Court should therefore reject the Court of Appeals' approach — which leaves "feasibility" utterly void of meaning — in order to obviate the necessity otherwise of squarely facing the constitutional issue of improper delegation. *Cf. Ashwander* v. *TVA*, 297 U.S. 288 (1936).[3]

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[3] Other courts in construing the "feasibility" requirement have appropriately cabined what otherwise would be unbridled discretion vested in OSHA with respect to the "feasibility" requirement. *See, e.g.*, Texas Independent Ginners Ass'n v. Marshall, *supra*; RMI Co. v. Secretary of Labor, 594 F.2d 566 (6th Cir. 1979); Turner Co., Div. Of Olin Corp. v. Secretary of Labor, 561 F.2d 82 (7th Cir. 1977).

B. The "Feasibility" Requirement Of The Statute

The pertinent portion of the regulatory scheme at issue in both *Cotton Dust* and the *Lead Case* can be briefly summarized. With respect to health standards in the workplace, Section 6(b)(5) of the Act provides that OSHA is to set a standard which best protects workers "to the extent feasible" and that "feasibility" must be a factor in fashioning a health standard. "Feasibility," as indicated above, is not defined by the Act. Not only is the statute silent in this respect, so too the legislative history sheds little light on the meaning of this critical statutory concept. Further, no standards or considerations governing "feasibility" are enumerated in the statute or clearly articulated in the legislative history.

The Court of Appeals in the *Lead Case* was not unaware of Congress' silence. As noted by Chief Judge Wright in that case:

> On this crucial matter [of feasibility] . . . Congress has said no more. The conventional arts of statutory construction are of little help in understanding such scant language, especially where the legislative history is virtually silent. Maj. opinion at 141.

Lacking specific guidance from Congress,[4] the Court of Appeals in the *Lead Case* resorted to two sources for imbuing the barebones "feasibility" concept with meaning: first, judicial glosses on the term, and second, the views of the agency itself. In our view, the Court of Appeals

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[4] As the Court of Appeals observed in the Lead Case, maj. op. at 141 n. 103, the legislative history provides limited insight into what Congress had in mind with respect to the meaning of feasibility. Senator Javits' reference to the feasibility requirement, however, certainly suggests that the term has more meaning than that given it by the Court of Appeals.

then abdicated the judicial function and, through its interpretation of the key statutory terms, "feasibility" and "feasible," permitted OSHA to achieve an unsupportable and extraordinary result.

OSHA has recently formulated a series of health standards in various industries, all of which raise fundamental questions as to the statutory term, "feasibility." This Court reviewed the benzene standard only last Term. *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute, supra.* The instant case raises for the second time in this Court the validity *vel non* of a substantive health standard (cotton dust) promulgated by OSHA; in the *Lead Case*, still another sweeping OSHA health standard is at issue.[5]

The benzene, cotton dust and lead cases have a common theme. OSHA has promulgated, over industry objections, far-reaching and unprecedented health standards. The standard in *Benzene* was struck down, correctly, by this Court. The standards in *Cotton Dust* and the *Lead Case*, threatening as they do the economic viability of major segments of U.S. industry, deserve the

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[5] Since the validity of the arsenic standard (29 C.F.R. § 1910.18) has not been ruled upon by the Ninth Circuit, this brief will not address in any detail the facts of that case. We would urge the Court however to keep in mind that that standard, too, raises the question as to the meaning of the statutory term "feasible." Indeed, one of the petitioners' arguments in that case is that OSHA had unlawfully postponed determination of the arsenic standard's feasibility until enforcement proceedings had commenced and had thus promulgated an unlawfully vague standard for those smelters which admittedly could not comply with it. A standard which says only "do what is feasible" is no proper standard at all. For such a standard merely begs the feasibility question. If the Court upholds the standard in that case the effect would be to delegate legislative authority one more step down the line to still another independent government agency, the Occupational Safety and Health Review Commission.

same fate. OSHA, the single-purpose agency created by Congress to regulate the health and safety of the workplace, has, unconstrained by the Court of Appeals, gone too far. And in both cases, the Court of Appeals, in reviewing the standards fashioned by OSHA, has judicially crafted standards or principles as to feasibility which must be rejected.

In *Cotton Dust*, OSHA has promulgated utterly unworkable health standards. Confronted with industry's arguments as to the economic infeasibility of the standards, the Court of Appeals, in an opinion by Chief Judge Bazelon, framed a very expansive standard of "feasibility." According to Judge Bazelon, the requirement of economic feasibility is satisfied *so long as industry's compliance with that single standard of that one single-purpose agency would not result in the industry's economic demise*. No consideration was given by the Court of Appeals, or required by it of OSHA, to the cumulative effects of the textile industry's compliance with the standards of other single-purpose regulatory agencies pressing their respective goals.

Cotton Dust is not an aberrational decision. It was, to the contrary, the harbinger of an even more expansive "approach toward feasibility" created in the *Lead Case* by Chief Judge Bazelon's successor. Notwithstanding the undisputed fact that no technology currently exists that could bring about industry's compliance with the lead standard, the D.C. Circuit, in an opinion by Chief Judge Wright, held that OSHA had fully satisfied the feasibility requirement of Section 6(b)(5). According to Chief Judge Wright, over the strenuous dissent of Judge MacKinnon,[6] technological feasibility was satisfied even

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[6] Judge MacKinnon in dissent aptly described the feasibility provision in Section 6 (b) (5) as "very inartfully crafted." Dissenting op. of MacKinnon, J. at 20.

though no technology existed nor was technology even "loom[ing] on today's horizon"[7] that would permit industry to meet OSHA's stringent standard. Chief Judge Wright permitted this remarkable result by relying upon a *presumption* — the presumption that when the deadline for compliance arrives ten years hence — a number that OSHA essentially picked out of a hat — technology will in fact exist which will be *economically* feasible for industry to have put into place to meet OSHA's standard. This is judicially sanctioned agency discretion run riot; OSHA has, in short, required industry to do that which may be utterly impossible to achieve technologically or economically, or both, yet the courts have upheld this result in an unduly deferential and flatly erroneous reformulation of well-settled principles of administrative law, such as the substantial evidence and best evidence rules.

The District of Columbia Circuit has gone very far toward permitting OSHA to do whatever it wants to do

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[7] This is in direct contradiction with the Third Circuit's holdings in American Federation of Labor & Congress of Industrial Organizations, AFL-CIO v. Brennan, *supra*, and American Iron and Steel Inst. v. OSHA, 577 F.2d 825 (3rd Cir. 1978). In American Federation of Labor, the court held that the Secretary of Labor's technology-forcing power is limited to technology that "looms on today's horizon." 530 F.2d at 121-22. Similarly, in American Iron and Steel Institute, the court emphasized that "the Secretary can impose a standard which requires an employer to implement technology 'looming on today's horizon,' and is not limited to issuing a standard solely based upon technology that is fully developed today. *Nevertheless, the statute does not permit the Secretary to place an affirmative duty on each employer to research and develop new technology.*" 577 F.2d at 838 (emphasis added). *See also* Texas Independent Ginners Ass'n v. Marshall, *supra* (requiring that technology which could achieve the OSHA-mandated standard be "existing, nearly developed or available . . . "). Slip op. at 1225 n. 49.

in pursuing its single purpose. Both in *Cotton Dust* and the *Lead Case,* the "feasibility" requirement, which Congress did not specifically define, has now been rendered meaningless.

C. Evisceration Of The "Substantial Evidence" Rule

In fashioning a *judicial* approach to feasibility, the court below in both cases did so within the framework of the "substantial evidence" test by which the feasibility issue was then judicially examined. The Court of Appeals' formulation of that test is, to be sure, erroneous and must be rejected. But its formulation is more than just wrong. The "substantial evidence" test as formulated and applied by Chief Judge Bazelon and his successor to both the cotton dust and lead health standards demonstrates that the real root of what went wrong below is that, as construed by the Court of Appeals, the Act constitutes an impermissible delegation of legislative power.

The Court of Appeals, in its self-conceived role as a "partner of the agency,"[8] sanctioned under the rubric of "substantial evidence" *OSHA legislation fashioned without the benefit of clear congressional standards.* Congress' drafting of the statute in sweeping terms put the Court of Appeals, and indeed OSHA itself, in a box. OSHA compounded the problem by making error after

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[8] In Cotton Dust, Chief Judge Bazelon referred to the "partner of the agency" concept in the following manner:

> Congress apparently created an "uneasy partnership" between the agency and the reviewing court to check the extravagant exercises of the agency's authority to regulate risk. Our role in this partnership is to ensure that the regulations resulted from a process of reasoned decisionmaking consistent with the agency's mandate from Congress. 617 F.2d at 649-50 (footnotes omitted).

error in the procedures by which its unguided rulemaking was accomplished, as will be explained below. And neither Chief Judge Bazelon nor Chief Judge Wright in the hundreds of pages of analysis below in *Cotton Dust* and the *Lead Case* managed to get the courts or the agency out of the box. To the contrary, they made a bad situation even worse, as we will now show.

While describing the "substantial evidence" requirement as a "stringent" and "rigorous" standard, 617 F.2d at 648-49, the Court of Appeals in fact adopted in *Cotton Dust*, and as amplified in the *Lead Case*, a standard of review which is less rigorous than that traditionally applied under an "arbitrary and capricious" test. The result is an immunization of OSHA action from meaningful judicial review, inconsistent with both the letter and the spirit of the Supreme Court's recent ruling in *Benzene*.[9]

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[9] In that case, the Court rejected the agency's argument that the rulemaking record contained substantial evidence "to support its conclusion that there is no absolutely safe level for a carcinogen. . . . " The court held, to the contrary, that "the burden was on the agency to show, on the basis of substantial evidence, that it is *at least more likely than not* that [the health standard then in effect for exposure to benzene] presents a significant risk of material health impairment." 100 S. Ct. at 2869 (emphasis added).

This view of substantial evidence was not the plurality's alone in Industrial Union Dept., AFL-CIO v. American Petroleum Inst., *supra*. Justice Marshall, although dissenting, acknowledged that the "substantial evidence test" is "more stringent than the traditional 'arbitrary and capricious' standard" and that even the latter test "contemplates a searching 'inquiry into the facts' in order to determine 'whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.'" 100 S. Ct. at 2895-96 (dissenting op. of Marshall, J.) *quoting* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

See also National Lime Ass'n v. EPA, 627 F.2d 416, 430, 451 n. 126 (D.C. Cir. 1980), holding that the "arbitrary and capricious" standard imposes a "rigorous standard" of judicial review involving a "hard look" at an agency's actions.

Effectively rejecting this precedent, the Court of Appeals in *Cotton Dust* relied instead on its own previous decisions, holding that the "substantial evidence" requirement is one that merely "ensure[s] that decision makers articulate the basis for their decision." 617 F.2d at 651 n. 66. Thus, the court below held only that "the agency must pinpoint the factual evidence and the policy considerations upon which it relied. This requires explication of the assumptions underlying predictions or extrapolations, and of the basis for its resolution of conflicts and ambiguities. . . . [T]he court does not reach out to resolve controversies over technical data. Instead, it seeks to ensure public accountability." *Id.* at 651.[10]

To the court below, then, the requirement that OSHA find substantial evidence to justify its rulemaking boils down simply to a necessity for OSHA to explain its reasons for acting in any way it chooses. Similarly, the court's reading of the statutory command that OSHA act only on the basis of the "best available evidence" means only that OSHA make its "policy considerations" based upon whatever evidence it chooses to collect, even if that "information is incomplete." *Id.* This is utterly contradictory to the approach espoused by Mr. Justice Powell in his discussion in ***Benzene*** of the "best available evidence" requirement. "The statutory preference for the 'best available evidence' . . . implies that OSHA must use the best known techniques for the accurate estimation of risks and benefits when such techniques are available." 100 S. Ct. at 2876 (concurring [in part] opinion of Powell, J.).

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[10] The Fifth Circuit, in contrast to the approach of the court below, required OSHA to demonstrate substantial evidence both as to factual and policy determinations. Texas Independent Ginners Ass'n v. Marshall, *supra*, slip op. at 1214.

The District of Columbia Circuit thus, in effect, rejects the Supreme Court's warning in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951), that, when reviewing agency actions under the substantial evidence test, courts must not foresake "the conventional judicial function." *Id.* at 490. That function, in a word, is to review meaningfully the entire administrative record to ensure that the agency decision is, on the whole record, supported by substantial evidence. In contrast to this well-settled approach, this single-purpose agency is permitted, indeed encouraged, by the Court of Appeals to engage in just the sort of rulemaking by speculation and assumption that this Court warned against in *Benzene*. Under this approach, OSHA can do anything it wants to do.[11]

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[11] The grant of sweeping power which the Court of Appeals for the District of Columbia Circuit provides OSHA is even more disturbingly apparent in the Lead Case. The rulemaking proceedings in that case were rife with procedural imbroglios. So significant were the procedural issues at stake, that the majority in the court below stated: "As we acknowledge at several points in this opinion, OSHA's procedures and evidence gathering were less than perfect, and a number of important questions on appeal are very close." Maj. op. at 7 n. 6. Although the Court of Appeals found its hand tied by a strained reading of this Court's decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), still the majority was critical of OSHA's actions: OSHA was "careless or inefficient in its procedures throughout this rulemaking," maj. op. at 15; "the compliance rules in the final standard appear ill-drafted and ill-explained, especially in light of their departure from . . . the proposed lead rules," maj. op. at 50; the agency's explanation "is a *tour de force* of obfuscation," maj. op. at 59. Of these procedural irregularities, perhaps most glaring was OSHA's decision to issue a final standard with a permissible exposure limit for airborne lead of 50 micrograms per cubic meter of air (50 ug/m^3), after having issued a proposed standard at 100 ug/m^3 as a replacement for an existing OSHA standard settng the permissible exposure limit at 200 ug/m^3. Thus, "[v]ery little evidence was submitted by industry petitions *or the agency* on any level but the 100 ug/m^3, or higher.

The extraordinary power which the Court of Appeals vests in OSHA becomes even more glaring when one examines the lead standard's medical removal protection earnings requirement at issue in the *Lead Case*. This provision requires employers to remove workers under specified circumstances from the exposed workplace and to maintain those workers at their existing wage levels. Yet, under the statute, OSHA is not vested with authority to adopt the medical removal/earnings protection program required by the new lead regulation. Furthermore, as the dissent in the *Lead Case* per-

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OSHA *concedes that no evidence whatsoever was introduced on the economic feasibility of complying with the 50 ug/m³ level."* Dissenting op. of MacKinnon, J. at 9 (emphasis in original). The D.C. Circuit, however, found the standard both technologically and economically feasible. Ignoring the spirit, if not the letter, of this Court's holding in Benzene that OSHA should regulate on the basis of fact and not assumption or theory, the majority of the Court of Appeals in the Lead Case found it appropriate for OSHA to "make highly speculative projections about future technology. . . . " Maj. op. at 145. Thus, the court upheld the technological feasibility of the lead standard on the "*presumption*" that there is a "reasonable possibility" that at some point in the future a "typical firm" will be technologically able to comply with the standard "in most of its operations." Maj. op. at 154, 159. This it did, furthermore, by finding that the substantial evidence test was satisfied by testimony that "give[s] *some credence* to OSHA's *prediction* that the PEL *might* be met." Maj. op. at 177 (emphasis added).

The majority of the Court of Appeals in the Lead Case then proceeded to excuse OSHA from the duty to estimate costs, *because* the technology involved was so speculative. Maj. op. at 170, 179. OSHA made no attempt to present or elicit evidence on the costs of the final lead standard. Nor did it attempt to determine the costs of the medical removal protection earnings requirements compelled by the standard. The court below found it unnecessary to require such evidence of OSHA on its theory that the best available evidence rule merely requires OSHA to refer to that evidence, if any, that happens to be "available" in the record. *See, e.g.*, maj. op. at 147-48, 170-71 n. 133.

suasively explains, the majority's reasoning on this issue flies in the face of clear statutory language, the legislative history of the Act and the Supreme Court's recent interpretation of such language and history in *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980). Dissenting opinion of MacKinnon, J. at 13-20. This provision is, as the majority opinion in the *Lead Case* noted, "relatively without precedent." Maj. opinion at 12, 22 n. 15 and 66 n. 63. It is totally different from the medical removal protection provisions contained in the asbestos and cotton dust standards. *See Industrial Union Department, AFL-CIO* v. *Hodgson*, 162 U.S. App. D.C. 331, 499 F.2d 467 (1974); *American Federation of Labor & Congress of Industrial Organizations* v. *Marshall*, *supra*. Both those provisions were limited to employees who were unable to wear respirators and for whom "a different position" is available which they are "able to perform." *See, e.g.*, 29 C.F.R. §1910.1001(d)(2)(iv)(c). Thus, while the requirement in both the lead standard and the cotton dust standard is applicable even when the worker's health is not endangered, and even when the perceived hazard to the worker results from off-the-job activities, in the lead standard the requirement is operative even when the employer has no position available to which the removed worker can be transferred. Thus, under the lead standard, an employee may be sent home, healthy and with full pay for not working.

D. The Doctrine of Nondelegation

The result below is extraordinary. The result in the *Lead Case* is even worse. The effect of the two decisions, taken together, is that OSHA is not constrained by any standard or benchmark with respect to the feasibility of its health standards. OSHA has been permitted to engage not simply in rulemaking; rather, as the

Act has been interpreted by the Court of Appeals, OSHA has been judicially sanctioned to engage in the core legislative function of policymaking.

This is no academic concern. By means of the lead standard, OSHA, as sanctioned by the Court of Appeals, is in effect requiring ASARCO and other smelters to rebuild their plants from the ground up in order to achieve a single health-related purpose. Similarly, far-reaching results are now mandated for the textile industry in the instant case. By doing so in both cases, OSHA has made a broad policy choice that, in our view, severely impacts the imperative economic interests and stability of entire industries.

Whatever the efficacy of basic doctrines of constitutional law as to separation of powers, one point should be clear: OSHA has not simply formulated or legislated a set of health standards; it is restructuring the very shape and foundation of vital U.S. industries. And OSHA's reshaping of those industries is being carried out from the admittedly important but nonetheless limited vantage point of worker health — as affected by *one* and only one perceived threat to health.[12]

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[12] The perceived threat to health, moreover, is not under any rational view imminent. To the contrary, neither cotton dust nor lead is a carcinogen. And, as regards lead, the perceived health effects are subclinical in nature, posing no substantive threat to worker health. As stated by the court in the Lead Case, "OSHA is acting to prevent, not overt early symptoms of disease, but subclinical effects." Maj. Op. at 115. *Cf.* Texas Independent Ginners Ass'n v. Marshall, *supra* (holding, in striking down OSHA's health standard for the cotton gin industry, that OSHA failed to adduce substantial evidence to support the conclusion that exposure to cotton dust by cotton gin employees constituted a significant health hazard). Slip op. at 1217-21.

The issue, then, is whether the Court of Appeals has interpreted Section 6(b)(5) so as to cross the line, which no one would claim to be a bright one, between improper delegation of legislative power and an appropriate delegation in the contemporary regulatory environment. While the constitutional line may not be a bright one, we think that the answer here is clear. As the Act has now been construed by the Court of Appeals, the statute fails to provide or give any standard or meaning whatever to the vital concept of "feasibility" — the most significant limitation upon OSHA's broad authority has been effectively written out of the statute.

We think, and a member of this Court has indeed recently suggested,[13] that the nondelegation doctrine is not some moribund relic from the old days of substantive due process. To the contrary, decisions such as *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), provide a shield for the judiciary against the burdens or, perhaps for some, the temptations of judicial legislating and policymaking. For when Congress sets forth its policies and articulates clearly intelligible standards to guide the executive branch in implementing Congress' will, the province of the judiciary remains properly that of authoritatively determining what the law is — but not creating the policies underlying the law. *Panama Refining* and its progeny are thus not instruments of judicial activism, to use a perhaps shop-worn phrase, but necessary doctrines by which the appropriate functioning of all three branches of government can be sustained in changing times. The Court of Appeals has failed to ensure the appropriate functioning of the coordinate branches of the government.

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[13] *See* Industrial Union Dept., AFL-CIO v. American Petrolum Inst., *supra* at 2886 (concurring op. of Rehnquist, J.).

Let there be no mistake: concern as to improper delegations of legislative power cannot be dismissed as so much reactionary cant. Nor can this Court afford to ignore first principles of our form of government. As one member of this Court well put it:

> Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. *United States* v. *Robel*, 389 U.S. 258, 276 (1967) (concurring opinion of Brennan, J.).

See also, e.g., Arizona v. *California*, 373 U.S. 546 (1963) (Harlan, J., dissenting in part); O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 93 (1973) ("Congress, in the act of delegating legislative power, may not abdicate its constitutional responsibility for making the nation's basic decisions of policy.").

The sweeping delegation of legislative power, the effect of the Court of Appeals' approach, to a single-purpose executive agency which has formed a view as to "the best means of carrying out [its] mission," *United Steelworkers of America, AFL-CIO-CLC* v. *Marshall, supra*, maj. opinion at 19, circumvents the legislative process of compromise, accommodation, and eventual legislation. As Professor Tribe has aptly stated:

> [B]road delegations are politically objectionable because, by enabling Congress to pass the buck on hard choices, and to leave such choices to administrative or executive processes less open to inputs from affected groups, such delegations may short-circuit the pluralist processes of interest accommodation usually structuring legislative decision-making. L. Tribe, *American Constitutional Law* 288 (1978).

Similarly, in the words of Judge Friendly, "[w]e still live under a Constitution which provides that all 'legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of Senate and House of Representatives;' even if a statute telling an agency 'Here is the problem: deal with it' be deemed to comply with the letter of that command, it hardly does with the spirit." H. Friendly, *The Federal Administrative Agencies* 21-22 (1962) (footnote omitted).

In our view, under the Court of Appeals' decisions in *Cotton Dust* and the *Lead Case* Congress did nothing more in Section 6(b)(5) than identify the problem and direct the executive branch to deal with it. This Court should not permit that extraordinary result to stand, especially in the present era — even in the so-called age of "deregulation" — when single-purpose regulatory agencies created by the Congress in the past twenty years nonetheless continue to abound and to regulate. This is a different time than before, in that Congress has acted in the past two decades in novel ways. The Court can ill afford to ignore this fact, particularly now that the substantive actions of one such single-purpose agency are coming before it for the first time since OSHA's creation.[14]

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[14] Prior to the decision in Industrial Union Dept., AFL-CIO v. American Petroleum Inst., *supra*, all of this Court's cases dealing with the Act have dealt with procedural, not substantive, issues. Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (dealing with the requirement of search warrants for OSHA inspections); Atlas Roofing Co. v. OSHA, 430 U.S. 442 (1977) (treating the issue of entitlement to jury trial with respect to civil penalties); Whirlpool Corp. v. Marshall, *supra* (dealing with the right of employees to avoid hazardous workplace conditions).

For, as we have now made clear, OSHA has adopted health standards that may bring the textile industry up to the very brink of economic demise, and it has required the lead industry to rebuild all of its plants from the ground up — an awesome and economically unbearable price to exact for compliance with what are, in our view, flatly unrealistic, unsupported standards that are of dubious benefit to persons whose health OSHA seeks to protect.

The Court of Appeals has abdicated its responsibility. By sweepingly interpreting the words "feasible" and "feasibility" so as to render them meaningless, the Court of Appeals has, in effect, conferred core legislative functions upon OSHA, so as to compromise the respective provinces of the coordinate branches of government.

E. CONCLUSION

Above all, this case should not be viewed by the Court in isolation. This is not simply a technical case involving a particular health standard. OSHA and the Court of Appeals went far in *Cotton Dust*, just as OSHA, until reversed by the Fifth Circuit Court of Appeals, went far in *Benzene*.[15] OSHA and the Court of Appeals for the District of Columbia Circuit have gone even farther in the *Lead Case*. The Court should reject OSHA's messianic approach in formulating sweeping health standards, just as it did in *Benzene*, so as to avoid the vexing constitutional issue that would otherwise be raised — namely, that Section 6(b)(5) of the Act, as construed by the Court of Appeals, constitutes an impermissibly overbroad delegation of legislative power.

Respectfully submitted,

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[15] The Fifth Circuit recently overturned OSHA's health standard for the cotton gin industry on the grounds (a) that OSHA had not found by substantial evidence that a significant risk of a material health impairment existed, and (b) that OSHA had not demonstrated by substantial evidence that the standard was reasonably necessary or appropriate to provide safe or healthful employment or places of employment. Texas Independent Ginners Ass'n v. Marshall, *supra*, slip op. at 1217, 1220-21, 1223-26.